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No. 90-1518

In The

Supreme Court Of The United States

October Term, 1990

BETTYE HEERDINK,
Petitioner,

v.

AMOCO OIL COMPANY
Respondent.

Petition For A Writ Of Certiorari to The United States Court Of Appeals for The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, after reviewing the evidence in the record, correctly held that petitioner failed to prove that respondent Amoco Oil Company declined to hire her because she is a woman.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A37-A46) is reported at 919 F.2d 1256. The order of the district court (Pet. App. A5-A36) is not reported.

[1] Amoco Oil Company's parent corporation is Amoco Corporation. Amoco Oil Company has no non-wholly owned subsidiaries.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1990. A petition for rehearing was denied on January 8, 1991. Pet. App. A47. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 23, 1979, petitioner applied for a job as a truck driver at respondent's terminal in Evansville, Indiana. Pet. App. A38. The job involved the transportation of gasoline and petroleum distillates to respondent's customers. Respondent's drivers are responsible for the safe loading, transporting, and unloading of such flammable petroleum products. I Tr. 91. Petitioner had driven a truck for three years, but she had no experience hauling petroleum products. Pet. App. A38-A39. In all, ten people applied for the three open truck-driver positions at the Evansville terminal in 1979. *Id.* at A39.

Respondent's terminal manager -- Gene Stoltz -- made the hiring decisions. Stoltz told petitioner that "he would consider someone with experience before he would consider her." Pet. App. A39. On August 27, 1979, respondent hired William Hall as a petroleum truck driver. *Ibid.* Hall had transported petroleum products for seven years, and he was familiar with respondent's terminal and procedures. *Ibid.* He had gained experience with respondent's operations while he worked for Coastal Truck Lines -- a carrier under contract to haul respondent's petroleum products. *Ibid.*, II Tr. 180. [2]

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[2]Respondent dismissed Hall soon after he was hired because he performed poorly. Pet. App. A39.

In late 1979, respondent offered a truck-driver position to Allen Dike. Like Hall, Dike had hauled petroleum products for at least six years and he had worked for Coastal Truck Lines where he had gained experience with respondent's facilities and procedures. Pet. App. A39-A40, III Tr. 38. Dike, however, declined respondent's job offer. Respondent then hired Larry Happe and George Rupp. Happe had driven petroleum products for sixteen years; Rupp had transported petroleum for eight years, and he was familiar with respondent's operations by virtue of his prior employment with Coastal Truck Lines. Pet. App. A39-A40, III Tr. 53-56.

2. Petitioner filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, in the United States District Court for the Southern District of Indiana. Petitioner contended that respondent failed to hire her as a truck driver in 1979 because she is a woman. The case was tried to a magistrate with the consent of the parties. Pet. App. A5.

The magistrate ruled in favor of petitioner. The magistrate found that respondent's explanation for its hiring decisions -- *i.e.*, the greater experience of those hired -- was a pretext for discrimination. Pet. App. A16. The magistrate stated that respondent "failed to meet its burden of . . . proving a legitimate nondiscriminatory business reason for preferring to hire the male applicants instead of" petitioner. *Id.* at A30. Accordingly, the magistrate found that respondent declined to hire petitioner because she is female. *Id.* at A23. The magistrate awarded petitioner back pay and attorney's fees. *Id.* at A24.

3. A unanimous panel of the court of appeals reversed. Pet. App. A37-A46. The court first noted that the magistrate erred in his discussion of respondent's burden to rebut petitioner's prima facie case of discrimination. The court of

appeals stated that the magistrate "incorrectly assumed that [respondent's] burden of rebuttal carried with it a burden of proof; [respondent] only bears a burden of production." *Id.* at A42.

More important, the court of appeals held that the magistrate's ultimate finding regarding discriminatory intent was "clearly erroneous." Pet. App. A45. After reviewing the evidence, the court stated:

> There is no evidence to support a finding that [respondent's] preference for experienced applicants was a pretext for discrimination. Similarly, there is no evidence to support a finding that [respondent] wanted to discriminate against [petitioner] because of her sex.

Id. at A44.

The court of appeals observed that the magistrate "committed clear error by ignoring the obvious reason for not hiring [petitioner]; the evidence unequivocally shows that the applicants who were offered positions had more total driving experience and more petroleum transport experience than did [petitioner]." Pet. App. 46. And the court concluded that "there is no evidence that Stoltz based his hiring decisions on any considerations other than nondiscriminatory, legitimate business reasons." *Id.* at 45.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review of the fact-specific question presented is warranted.

1. Contrary to petitioner's suggestion (Pet. 7-9, 27), the Seventh Circuit applied the correct standard of appellate review. Following this Court's direction in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), the court of appeals noted that the critical issue for review was the magistrate's ultimate finding of discriminatory intent. Pet. App. A41-A42. The court noted that the magistrate's finding could be "overturned only if shown to be clearly erroneous." *Id.* at A45. And the court adopted this Court's definition of the phrase "clearly erroneous" - *i.e.*, a finding is clearly erroneous if "'the reviewing court is left with a definite and firm conviction that a mistake has been committed.'" Pet. App. A45 (citation omitted). *Compare Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (same definition).

The court of appeals rightly performed its duty to review the record even though the magistrate couched some of his subsidiary findings in terms of credibility. As this Court noted in *Anderson v. City Of Bessemer City*, "factors other than demeanor and inflection go into the decision whether or not to believe a witness. . . . Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." 470 U.S. at 575.

Petitioner is also mistaken in contending (Pet. 9) that the Seventh Circuit ignored this Court's opinion in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court observed that a plaintiff may not be limited in the type of evidence that she submits to prove that the defendant's proffered reason is a pretext. In line with that decision, the court of appeals in this case did not adopt any artificial or limiting rules of relevancy. On the contrary, the court simply ruled that

"[t]here is no evidence to support a finding that [respondent's] preference for experienced applicants was a pretext for discrimination." Pet. App. A44. [3]

In short, the court of appeals applied the correct legal standards for appellate review. It reviewed the record evidence and was "left with a definite and firm conviction that a mistake ha[d] been committed." Pet. App. A45. The Seventh Circuit, of course, frequently affirms findings of trial courts in Title VII cases. *See, e.g., Swanson v. Elmhurst Chrysler-Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir.) (finding of Title VII violation not clearly erroneous), *cert. denied*, 110 S. Ct. 758 (1989); *Yowell v. United States Postal Service*, 810 F.2d 644 (7th Cir. 1987) (finding of no discriminatory intent not clearly erroneous). In this case, however, the court of appeals reviewed the evidence and concluded that the magistrate had committed a clear error. That fact-specific determination does not merit this Court's review.

2. The court of appeals correctly held that the magistrate clearly erred in finding that respondent did not hire petitioner because of her sex. It is evident that, because the transportation of petroleum products is a hazardous occupation (I Tr. 91), it made sense for respondent's terminal manager to prefer applicants with experience in hauling petroleum. Accordingly, he offered jobs to four applicants who had between six and sixteen

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[3]Petitioner makes the same error as the magistrate in asserting (Pet. 58) that respondent had the burden "to prove that [petitioner] was not a victim of discrimination." Petitioner, of course, had the burden of proving that she was the victim of illegal discrimination. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

years' experience in driving petroleum products. Pet. App. A39-A40. And three of those applicants were familiar with respondent's terminal and procedures. *Ibid.*

By contrast, petitioner had no experience in hauling petroleum products. Pet. App. A39. Thus, the powerful objective evidence shows the sincerity of the terminal manager's non-discriminatory statement to petitioner that "he would consider someone with experience before he would consider her." *Ibid.* To be sure, petitioner presented bits of evidence to counter that clear conclusion -- *e.g.*, the terminal manager did not list all of his hiring criteria with the Indiana Employment Security Division (Pet. 13). As the court of appeals observed, however, plaintiff's evidence was: (1) consistent with respondent's non-discriminatory explanation, and (2) wholly insufficient to overcome the plain inference that petitioner was not hired because she was far less experienced than those hired.

3. Petitioner's other fact-specific contentions also lack merit. For example, petitioner contends (Pet. 11-12) that respondent did not perform studies to validate the terminal manager's preference for applicants with experience in transporting petroleum. But this is not a case where respondent was required to prove, by objective data, the reasonableness of its hiring criteria. Rather, petitioner had the burden of proving that respondent used an illegal hiring criterion -- *i.e.*, sex. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). And the court of appeals correctly ruled that petitioner did not carry that burden.

Likewise, petitioner misses the mark when she argues (Pet. 18-19) that she was qualified for the truck-driver position. Respondent does not dispute that petitioner met the minimum qualifications for the job, and that she could have been trained to perform the job's tasks. *See* Pet. App. A44 & n.6. The point,

however, is that the undisputed and powerful evidence showed that Stoltz made offers to four other applicants because they were more qualified than petitioner.

Petitioner also suggests (Pet. 23, 54) that statistics show that respondent had a company-wide policy of discrimination. But the magistrate himself found that petitioner's "statistical analysis [was] not persuasive of a company-wide policy of discrimination." Pet. App. A33. In fact, the evidence showed that respondent's Indianapolis terminal hired a greater percentage of female applicants than male applicants when it hired 31 new drivers in 1979. Resp. C.A. Reply Br. 18. And since 1978, respondent has far exceeded the industry average in its hiring of female drivers in Indiana. *Id.* at 19-20. Accordingly, petitioner's reference to statistics does not undermine the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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